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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1902.

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No. 174.

CLINTON B. WISER, C. M. FIELD, JOHN A. KERR, JAMES A. FERGUSON, DORSEY NEVILLE, MARY M. HEATH, JOHN J. MILLER, HENRY L. MUGSFORD, WILLIAM J. FOSTER, EDGAR G. MILLER, L. F. HOIRNE, SIDNEY G. LAW, EDWARD M. SMITH, HARPER M. SMITH, BENJAMIN GOODMAN, LESTER M. CROUCH, JOHN B. CLUTE, KATIE T. COURTNEY, H. S. ANDERS AND CECIL QUENTIN, *Appellants,*

vs.

JOHN LAWLER, ED. W. WELLS, SEVEN STARS GOLD MINING COMPANY, INDUSTRIAL MINING & GUARANTY COMPANY, AND JOHN GRIFFIN, RECEIVER, *Appellees.*

Appeal from the Supreme Court of the Territory of Arizona.

REPLY OF APPELLANTS TO THE SECOND BRIEF FOR APPELLEES.

G. W. KRETZINGER,
M. F. GALLAGHER,
SOLICITORS FOR APPELLANTS.

BARNARD & MILLER PRINT. CHICAGO.

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REPLY OF APPELLANTS TO THE SECOND BRIEF FOR APPELLEES.

MAY IT PLEASE THIS HONORABLE COURT:

New matter appears in the second brief of the learned counsel for appellees to which we crave leave to make a short reply.

1. It is said that there was no contractual obligation on the part of the Seven Stars Gold Mining Company to pay anything to Lawler and Wells, and that it nowhere appears from the record that the Seven Stars Gold Mining Company paid a dollar of the money received by

Lawler and Wells on account of the price. *The obligation and the payor are immaterial, if funds realized from the sale of stock of the Seven Stars Gold Mining Company are substantially traceable to Lawler and Wells.*

2. But, in denying that any presumption arises upon this record that funds of the subscribers were used in paying Lawler and Wells, counsel fail to give weight to all of the pertinent facts. The Seven Stars Gold Mining Company was in possession of the mines on and after October 1, 1892, and, as expressly found, operated the mines from that date until August 17, 1893. (Finding, 30; Trans., 321.) During the time it was thus operating these mines the Seven Stars Gold Mining Company had no interest in any other property, and no source of income other than the sale of its stock. (Finding 28.) The only funds, therefore, which the Industrial Company received as the agent of the Seven Stars Gold Mining Company, were the funds of the subscribers to stock.

Now, if it is true, as suggested by counsel, that the Seven Stars Gold Mining Company was under no obligation to make payments direct to Lawler and Wells, it was clearly under an obligation *to pay the expenses of its own operation of these mines*, and it appears that these expenses were paid in its behalf up to the sum of $112,411.32, by the Industrial Mining and Guaranty Company. The presumption then clearly arises, as held in the many cases cited, that the funds used in discharging the obligation of the principal were the funds of the principal, which the agent had received. Out of the result of that operation Lawler and Wells received $47,812.25. (Finding, 46.)

Moreover, it is distinctly averred in the answer of Lawler and Wells that the gross proceeds of the opera-

tion of the property were paid to them by the Seven Stars Gold Mining Company. (Trans., 81.) It is expressly found that such gross proceeds amounted to $47,812.25. (Finding 46.) And it is further expressly found that all remittances to Lawler and Wells after November 1, 1892, were placed to the credit of the Seven Stars Gold Mining Company. (Finding 30.) It cannot be true then, as suggested by counsel, that it nowhere appears, "that the Gold Mining Company paid a dollar of the money received by Lawler and Wells on account of the price."

Futhermore, the last extension of time to make payments was negotiated by Warner, acting as president of the Seven Stars Gold Mining Company. (Answer of appellees, Trans., 80.)

3. As to the $112,399.96, paid direct by the Industrial Mining and Guaranty Company to Lawler and Wells, it is equally clear that the presumption arises, aside from the express finding, that the Industrial Company intended to, and did use, the funds of the subscribers in making these remittances.

The court expressly finds that the Industrial Company was the agent of the Seven Stars Gold Mining Company, and further finds, that it was engaged in "promoting" "the business transactions of the Seven Stars Gold Mining Company." (Finding 49.) Elsewhere the record shows that the Seven Stars Gold Mining Company was organized for the purpose of acquiring these properties "from Charles Cowland, *through the Industrial Mining and Guaranty Company.*" It is clear that the Industrial Company was a mere device whereby the property was to be acquired from Cowland, and paid for by the general sale of stock, and, while under its arrange-

ment with the Seven Stars Gold Mining Company, the Industrial Company was to pay for the mines, as counsel suggest, it was to do so merely as a promoting corporation and out of the proceeds of the sale of stock. Throughout the entire transaction it acted as an auxiliary corporation, and in the capacity of agent and promoter.

Counsel, referring to finding 30, points out that remittances to the Bank of Arizona, made by the Industrial Company, were placed to the credit of the Seven Stars Gold Mining Company. *This is the clearest proof that the intention was to use the funds of the Seven Stars Gold Mining Company in making such remittances.*

Not the technical status of the two corporations, nor upon whom lay the technical obligation to pay, nor the form in which payments were made; but are the funds of the subscribers, substantially traceable through the bank account of the Industrial Company to the operation of the mines and to Lawler and Wells, that is the decisive question.

It was all being done by Warner. He, manipulating both corporations, was carrying out this single and clearly defined plan of promotion, and when the sale of stock stopped the enterprise collapsed.

The contention that Warner, acting under the name of the Industrial Company, used funds derived from other sources in paying for the property, is utterly improbable, contradicted by the plain import of the transaction shown upon the record and in the face of an express finding. (Finding 26.)

6. Counsel say, that the Industrial Mining and Guaranty Company paid out $380,295.81 for purposes connected with this enterprise, "which was, doubtless, *chargeable as a debt against the Seven Stars Company.*"

Brief, page 2.) Is not this latter statement inconsistent with the contention that in making the payments to Lawler and Wells and in paying the expenses of the operation of the property, the Industrial Mining and Guaranty Company was using its own funds in discharging its own obligation?

But the fact that the Industrial Company expended in this entire transaction $380,295.81, does not preclude the necessary substantial tracing of the funds of appellants to Lawler and Wells. The first moneys came in from appellants September 28, 1892. During the eight months following that date the Industrial Company received $252,308.97 from the sale of guaranteed stock, and $2,583.80 from the sale of common stock. (Finding 54; Trans., 366.) During the same period it expended, in this transaction, $112,411.32, for operation and improvement of property, and $112,392.96 remittances to Lawler and Wells, the aggregate of which two sums is $18,448.42 less than the amount received from the subscribers.

All of the moneys which appellants now seek to recover from Lawler and Wells were received by them after September 28, 1892, and during the period that the Industrial Company was receiving and disbursing the funds of the subscribers.

The expenses incurred in the organization of the Seven Stars Gold Mining Company and in preparing, printing and distributing the prospectuses and for counsel fees, and other promotional expenses, is not shown; but such expenses would not rightly be chargeable to the Seven Stars Gold Mining Company, and it does not appear that they ever were so charged, or that any funds of the subscribers were wrongfully diverted to their payment.

7. Counsel limit their reply brief to the $131,859.52, realized from the American subscribers. We contend that the English subscribers are entitled to the same relief. That they were defrauded out of $125,852.33, is clear. The English prospectus was boldly false in its declarations (Trans., 29), and, therefore, the funds received by the Industrial Company from that source were impressed with the same trust, and are traceable to Lawler and Wells.

8. Counsel cite finding 50, which finds that Lawler and Wells had no knowledge that they were receiving the funds of the subscribers prior to the commencement of the suit. The effect of this finding of the District Court, is, of course, destroyed by the subsequent findings of the Supreme Court. Where a Supreme Court, upon reconsideration of the evidence, makes a new finding, as it did in this case, clearly that finding must overcome any inconsistent findings made by the District Court, and which had before been inadvertently adopted. The record shows that the opinion of the Supreme Court of Arizona was handed down November 9, 1900. On January 21, 1901, counsel for appellants appeared and moved the court to make the following findings, among others (Trans., 303):

1. Remittances to the Bank of Arizona for Lawler and Wells, after November 1, 1892, were placed to the credit of the Seven Stars Gold Mining Company.

2. On May 20, 1893, Lawler received notice in writing that remittances on account of the Cowland contract were being made from moneys derived from the sale of the stock of the Seven Stars Gold Mining Company.

3. Before July 25, 1892, Lawler had personal knowledge that persons were being induced orally to purchase

stock in the Seven Stars Gold Mining Company by representations as to the merits of the mining property in question.

4. The Seven Stars Gold Mining Company had no property other than its interest in said mines, and no source of income other than the sale of its stock.

These submissions of findings were argued by counsel January 21, 1901, and on March 23, following (Trans., 327), the Supreme Court found that the four acts, above suggested, were true, and added them to the findings that had been made by the District Court.

Respectfully submitted.

G. W. KRETZINGER,
M. F. GALLAGHER,
For Appellants.